apart from that it appears to be impossible that an executor who has entered under a legal title conferred by the issue of the probate from the Court can ever be said to be in possession adverse to the estate of the deceased. He is not entering under a void deed. He is entering as a result of a solemn judicial act which holds good even after the will has been found to be void until the probate itself is revoked.

For the above reasons I think that the defences fail and that the plaintiff is entitled to judgment.

Judgment for the Plaintiff.

Solicitor for the Plaintiff—*Richard Williamson.*

Solicitors for 2nd, 3rd, 4th and 5th defendants—*Donaldson & Burkinshaw,*

Solicitors for the infants—*Johannes & Sammy.*

[APPELLATE BANKRUPTCY JURISDICTION]

RE TAN KENG TIN & RE CHOP SOON BEE.

[SINGAPORE BANKRUPTCIES Nos. 285 of 1929 and 347 of 1930 CONSOLIDATED]

[SINGAPORE CIVIL APPEAL No. 9 of 1932]

Ordinance No. 155 (Companies) Section 111 (3)—Banking Company's lien over its own shares —Construction of Statutes—Marginal Note to S.S. Ordinances.

Section 111 (3) of Ordinance No. 155 (Companies) provides that no Banking Company shall lend any part of its funds on the security of its own shares. A shareholder of the Batu Pahat Bank Limited holding fully paid up shares had an overdraft with the Bank. After the enactment of section 111 (3) the Bank amended its Articles of Association so as to give themselves a lien over their fully paid shares. The customer having become bankrupt the Official Assignee claimed the shares.

Held. By Murison, C.J., and Burton, J., Whitley, J. dissenting, that the Bank had no lien over the shares.

Per Terrell, J. The Marginal notes to the Ordinances of the Straits Settlements are part of the Ordinances and may be referred to for assistance in interpretation.

The facts were as follows:—

The Batu Pahat Bank Limited was a banking company registered in Singapore in 1921. By Article 29 of its Articles of Association the Bank were given a lien upon all the shares (not fully paid up) registered in the name of each member. Tan Keng Tin was a shareholder holding fully paid up shares. He was also a customer having a current account which was overdrawn continuously onwards from 1921. Interest on the overdraft and dividends on the shares were respectively debited and credited to the overdrawn account. The share certificates were never deposited with the Bank.

In 1923 the following provision of the Companies Ordinance was enacted:—

> 111(3) No (Banking or Insurance) Company shall lend any part of its funds on the security of its own shares.

In 1927 the Bank by Special Resolution amended Article 29 by deleting the words "(not fully paid up)" thereby extending the lien to fully paid up shares.

In 1927 Tan Keng Tin became bankrupt. The Official Assignee claimed the shares free of lien and the Bank claimed the lien.

Demuth for the Bank.

Taylor, Assistant Official Assignee.

Cur. Ad. Vult.

TERRELL, J.—The facts in this case are not in dispute. The bankrupt was the sole proprietor of a firm called Goh Chok & Company. He was at all material times and still is the registered holder of 100 fully paid shares of $100 each in the Batu Pahat Bank Limited, a Company registered in Singapore. In or about the year 1921 Tan Keng Tin obtained from the Bank an overdraft for $10,000 in respect of which he appears to have given the Bank a promissory note but no other security. Under the original Articles of Association, Article 29 only gives the Bank a lien on partly paid shares. No lien therefore attached to Tan Keng Tin's shares in respect of his overdraft. In 1927, however, the Company amended Article 29 by Special resolution with the result that the Bank's lien *prima facie* attached to fully paid shares such as those registered in the name of Tan Keng Tin. In 1928 the Bank obtained a promissory note from Tan Keng Tin in respect of his overdraft which then stood at $9,000. The Bank at no time had possession of the scrip for the shares registered in Tan Keng Tin's name, but now that Tan Keng Tin has been adjudicated bankrupt they claim a paramount lien on the shares in respect of the overdraft. This lien is disputed by the Official Assignee.

The Official Assignee's argument shortly is that in 1923 the law relating to companies was amended and Section 111(3) of the Companies Ordinance 1923 prohibits banking companies from lending any part of their funds on the security of their shares. It is argued therefore that since 1923 a banking company has lost the power possessed by other companies to declare under its articles a lien on a shareholder's share in respect of any debts due by such shareholder to the Company. Or in other words that owing to the provisions of Section 111 Article 29 is *ultra vires.*

In considering this question no assistance can be obtained from the English authorities as Section 111(3) does not appear in the English Companies Act.

It was submitted by counsel on behalf of the Bank that this sub-section only related to loans to persons referred to in Section 111(1) and (2), namely directors or officers of the company, but I do not think that this contention can be maintained. The wording of Sub-section (3) is perfectly general and not limited in its effects to loans to directors and officers. It is to be noticed that Sub-section (2) specifically refers back to Sub-section (1) which is not the case with Sub-section (3). This interpretation is strengthened by the marginal note which reads as follows:—

> "Loans by banking, etc. companies to their directors or officers or on their own shares."

The question whether or not the marginal note of a statute may be looked at for the purpose of assisting the interpretation has resulted in conflicting decisions. Jessel, M.R., who held in *Venour* v. *Sellon*, 2 Ch.D. 522 that the marginal note could be referred to, subsequently doubted his previous decisions, see *Sutton* v. *Sutton*, 22 Ch.D. 511. In a more recent case—*Bushell* v. *Hammond* 1904, 73 L.J. K.B. 1005.—Collins M. R. seems to have taken the same view as that expressed in Sir George Jessel's earlier *dictum*. The general rule that the marginal notes may not be referred to appears to be founded upon the principle "that these notes are inserted not by Parliament nor under the authority of Parliament but by irresponsible persons" (per Phillmore L.J. *in re Woking Urban District Council Basingstoke Canal Act 1911*), (1914) 1 Ch.D. 300 Baggallay L.J. rejected the marginal note in the case of *A. G.* v. *Great Eastern Railway*, 11 Ch.D. p. 449 on the same ground. Where therefore, as in the Colony, the marginal notes are treated as part of an Ordinance and are discussed and even amended in Committee, there would appear to be no reason why they should not be referred to assist the interpretation of the Section.

Before proceeding to a consideration of the effect of sub-section (3) it may be noted that even though the article provided no lien on Tan Keng Tin's shares at the time the loan was first created, such lien would in the case of other companies attach to the shares as a result of the amendment of the articles, provided the amendment was made *bona fide* (See *Allen* v. *Gold Reefs of West Africa, Ltd.*, (1900) 1 Ch. 656. It is also settled by authority in England that a lien attaches to shares registered in the name of a director of a banking company even though the shares are not deposited with the Bank (See *In re National Bank of Wales Ltd.*) 1899 2 Ch. 629 at pp. 675 and 676. The fact that the scrip was not deposited does not therefore affect the matter one way or the other.

In the case now before the Court it is quite clear that no money was advanced to Tan Keng Tin on the security of his shares. The advance was in fact made on Tan Keng Tin's personal security alone. The question therefore arises whether it can be said that the Company has lent any part of its funds on the security of its shares merely through the operation of Article 29 which purported to attach a lien long after the loan was first incurred. On the whole I have come to the opinion that the circumstances under which the loan was made are not strictly relevant and that the question whether or not a lien attaches depends on whether Article 29 has, as a result of Section 111 (3) of the Companies Ordinance, become *ultra vires*.

Where the legislature had thought fit in adopting the provisions of an English Act of Parliament to make alterations in particular sections, it is for the Court to give effect to such alterations and the conclusion is inevitable that it was the intention of the legislature to alter the law appertaining in England to this particular subject. It is evident that the object of Section 111(1) and (2) is to prevent banking companies from jeopardising the interests of their constituents by showing special favour to directors and officers of the Bank by giving advances without obtaining adequate security. Section 111 (3) did not appear in the corresponding Section 108 of the Companies Ordinance 1915 and was introduced for the first time in the Ordinance of 1923. Its object appears to be to extend this principle so as to prohibit special favour being shown to shareholders. In other words when shareholders require advances they are placed in exactly the same position as constituents who are not shareholders. This appears to me to be a beneficial principle and in accordance with public policy, and I find as a result that as the Bank is prohibited from making advances on the security of its own shares, so it follows that no lien attaches when such advances have been made. Otherwise the provisions of the sub-section could be quite easily evaded. I hold therefore that the contention of the Official Assignee succeeds and that the Bank has no paramount lien in respect of the shares registered in the bankrupt's name.

From this Judgment the Bank appealed to the Court of Appeal.

The Appeal was heard in Singapore by Murison C. J., Burton J. and Whitley J.

Laycock for the Appellants.

Section 111 (3) of Ordinance 155 is not new, except as a compulsory statutory provision. It is taken from Regulation 8 of Table A. But Regulation 9 of Table A provides for a lien in

substantially similar form to Article 29 of the Appellant Bank's Articles of Association. The proviso "other than fully paid up shares" is merely inserted for stock exchange reasons and does not affect the principle. If such an article is bad because a lien on shares amounts to lending money on the security of shares, then it is bad whether the shares are fully paid up or partly paid up. To say that Article 29 of the Bank's Articles is *ultra vires* by reason of Section 111 (3) is as much as to say that Regulation 9 of Table A is *ultra vires* by reason of Regulation 8 which is absurd. The two Regulations must be read together so as to give the maximum validity to both; and similarly this must also be done with Section 111 (3) and Article 29.

Section 111 (3) is a penal clause. If there are two possible constructions of a penal clause one of which would mitigate and the other would aggravate the penalty, the Court will adopt the former construction. *Tuck & Sons* v. *Priester* L.R. 19 Q.B.D. 629. *L.C.C.* v. *Aylesbury Dairy Co.* L.R. 1898, 1 Q.B. 106.

In each case it is a question of fact whether a loan was actually made on the security of shares of the Bank. If it was it comes within the mischief of Section 111 (3); if not, that section must not be strained to cover debts due to the Bank by its members unless they were actually loans made on the security of its shares. In this case the Trial Judge found as a fact that no loan was made on the security of the Bank's shares. The Trial Judge considers that the object of the section is to prevent companies from jeopardising the interests of their constituents by loans to shareholders; but this reasoning is fallacious. To invalidate securities for loans is a strange way of safeguarding a Bank's funds.

Subsection (4) of Section 111 imposes certain specified penalties. When the law has imposed one penalty, equity will not impose an additional penalty such as invalidity of the security. *Wright* v. *Horton*, L.R. 12 App. Cas. 371 at pp. 377, 380, 383, 384. *Randall* v. *British and American Shoe Co.*, L.R. (1902) 2 Ch. 354. *re Globe New Patent Iron and Steel Co.*, 48 L.J. Ch 295 at p. 298.

Moreover sub-section 4 of Section 111 by necessary implication contemplates that the securities shall be valid securities. The amount realised on the securities cannot be realised at at all if the securities are void.

The Respondent was not called upon.

Cur. Ad. Vult.

The Court called on the Respondent.

E. N. Taylor (Assistant Official Assignee).

This matter was contested on a Summons under Bankruptcy Rule 188 supported by an agreed affidavit. Therefore there is nothing in the judgment which can properly be called a "finding."

The material facts are:—

1. In 1921 the Bank lent without any security so far as these shares are concerned;
2. In 1923 the legislature forbade any advance by the Bank on the security of these shares;
3. In 1927 the Bank attempted to enforce the lien.

There was nothing done *ultra vires* in 1921 and possibly the Bank can prove in the bankruptcy as ordinary creditors for the overdraft.

Terrell J's finding that Article 29 is *ultra vires* must be read as limited by the facts—it does not mean that the article is *ultra vires* for all purposes.

Under *Allen* v. *Gold Reefs of West Africa* (supra) the lien would attach to these shares but for section 111 (3) if the amendment was made *bona fide*, but having regard to Article 5, it was not so made.

The trial judge's view was that since no money was advanced on the shares in 1921 the question was—Did the lien, on the amendment of the Article relate back? and that the reply to that question is that it did not if Article 29 has, by reason of the intervening enactment of Section 111 (3) become *ultra vires*.

The Trial Judge's reasons are:—

(1) that a difference introduced in adopting an English Act shews the intentions of the legislature very strongly;
(2) that the object of the section is to be gathered from the section itself;
(3) that the above construction is in harmony with the policy of the section.

The Trial Judge in effect holds that subsection (3) is an express prohibition and that this prevents the Bank from obtaining the lien by relation back, and that a contrary interpretation would defeat the statute.

Cf. Heydon's case (1584) 3 Co. Ref. 7 (a) at folio 7 (b) and also Beal on Legal Interpretation 3rd Edition) at p. 310 and the cases there cited.

The Bank are attempting to obtain a security which they are expressly prohibited from holding and if the transaction is prohibited by statute no security can be created.

It was in any event *ultra vires* by reason of Article 5.

Section 111 (3) is a penal section. The person punished cannot keep the proceeds of his crime. The construction proposed by the Bank would penalise the creditors of Tan Keng Tin who are innocent third parties.

The Bank's claim and their proof of debt shew that they did look on these shares as security for the advance.

In re General Exchange Bank L.R. 6 Ch. App. 818.

In re National Bank of Wales (1899) 2 Ch. 629 at p. 675/6.

There was no subsequent separate transaction as in *National Bank of Australia* v. *Cherry* L.R. III P.C. 299.

(He was stopped by the Court).

Laycock was heard in reply.

Cur. Ad. Vult.

MURISON, C. J.—This is an appeal from an order of Terrell J. made upon a Bankruptcy summons taken out under Rule 188 of the Bankruptcy Rules.

Tan Keng Tin was at all material times, and still is, a fully paid shareholder in the Batu Pahat Bank Ltd., who are registered in Singapore.

He was also the proprietor of a business and a customer of the Bank. In 1921 he had an overdraft at the Bank for $10,000, later reduced to $9,000. He paid the interest, but kept possession of his shares and took dividends on them. There was no document suggesting hypothecation of the shares.

The trial judge held, and it is clear, that the Bank (apart from any question of lien) never held Keng Tin's shares as security for the overdraft or loan.

In 1924 the business failed, and in 1929 Keng Tin was adjudged bankrupt.

The Bank claimed a lien on his shares. The Official Assignee resisted the claim. The trial judge held there was no lien.

The Bank now appeals.

Article 5 of the original Articles of Association of the Bank is as follows:—

> "No part of the funds of the Company shall be employed by the Directors or the Company in the purchase of or lent on the Company's shares."

As the loan to Keng Tin was never on the security of Keng Tin's shares this Article does not apply to the loan. This Article was not brought to the attention of the trial judge, but anyhow it does not appear to be of any importance.

In 1923 Ordinance No. 155 (Companies) was amended by the introduction of subsection (3) into section 111. That subsection is as follows:—

> "No such company as aforesaid shall lend any part of its funds upon the security of its shares."

The practical effect of this was to put Article 5 into statutory form.

The next event relates to Article 29 of the Articles of Association. The original article was as follows:—

> "The Company shall have a first and paramount lien upon all the shares (not fully paid up) registered in the name of each member (whether solely or jointly with others) for all calls upon such shares and also for all debts, obligations, engagements and liabilities of such member solely or jointly with any other person to or with the Company whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not."

In 1927 the Company in due form altered the Article by deleting the words "(not fully paid up)."

The effect of this was that the Company gave itself (as it was entitled to do—*Alllen* v. *Gold Reefs of West Africa* 1900 1 Ch. 656—if no statute prevented it from doing so) a lien for debts upon all fully paid shares held by existing shareholders.

Thus, if no statute prevented it, Keng Tin's shares became subject in 1927 to the Bank's lien.

But section 111 (3) of Ordinance No. 155 (Companies) says that no bank shall lend money on the security of its shares. If the Bank can hold a lien upon shares of its shareholders, and lends money or continues a loan to them of money, on such terms, the Bank is lending money on the security of its shares. This proposition is admitted by the Appellants.*

The loan to Keng Tin, therefore, or to any other fully paid shareholder, was void when section 111 (3) became law and the provision of Article 29 as amended was of no effect as it was merely *ultra vires*.

There, therefore, never was and is not now any lien by the Bank on the security of Keng Tin's shares and the Bank have no lien on such shares.

It is to be observed that Article 29 covers calls, debts, obligations, engagements and liabilities. For the purpose of this appeal it is necessary only to consider debts and it is only in regard to these that I hold Article 29 to be *ultra vires*. Terrell J.'s judgment also, is, as I understand it, limited in this sense. Mr. Laycock, on this point argued that part only of an Article could not be *ultra vires*. It was, he said, either all *ultra vires* or all *intra vires*. I do not say that the whole Article is not *ultra vires* but in any event I know of no authority, nor was any quoted, for

* NOTE:—This seems to be a misunderstanding. Appellants deny any such admission.

Mr. Laycock's proposition. Upon the contrary, I think it is quite obvious that part of an Article can be *ultra vires* and part *intra vires*.

Mr. Laycock further argued that section 111 (4) provided a penalty for the infraction of section 111 (3) and that a forfeiture of the lien was exaction of a double penalty. In my opinion that is not so, because after 1923 no such lien ever existed in law at all. You cannot forfeit a right which never existed.

To the extent to which I have referred, therefore, I agree with the order of Terrell J. that the amendment of Article 29 was *ultra vires* in view of section 111 (3) of the Ordinance.

I would dismiss the appeal with costs.

BURTON, J.—I think the difficulty in this case is resolved as soon as the facts are placed in chronological order. The Bankrupt, Tan Keng Tin, was sole proprietor of a firm called Goh Chok & Co. The firm was closed in 1924, and on 4th October 1929 Tan Keng Tin was adjudged bankrupt. He was the registered owner of 110 fully paid $100 shares in the Batu Pahat Bank. The Bank never had possession of the scrip.

In 1921 he obtained from the Bank an overdraft for $10,000 which was later reduced to $9,000. At the time he obtained the overdraft Articles of Association Nos. 5, and 29 were in force, and they are material. They are as follows:—

> "5. No part of the funds of the Company, shall be employed by the directors of the Company in the purchase of or lent on the Company's shares."
>
> "29. The Company shall have a first and paramount lien upon all the shares (not fully paid up) registered in the name of each member (whether solely or jointly with others) for calls upon such shares and also for all debts, obligations, engagements and liabilities of such moniber solely or jointly with any other person to or with the Company whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not."

Article 29 was then amended and contained the words "not fully paid up" so that there can be no question of a lien attaching to the shares in respect of the overdraft.

In 1923 the Companies Ordinance was amended by the addition of subsection 3.

> "No such Company as aforesaid shall lend any part of its funds upon the security of its shares."

As far as the Batu Pahat Bank was concerned the effect of this amendment of the law was only to re-enforce the material part of Article 5.

On 7th September 1927 the Bank by special resolution altered Article 29 by deletion of the words "not fully paid up." This resolution was confirmed on 26th September 1927. At this time section 111 (3) of the Companies Ordinance was in force, and if there is a conflict between Article 29 as amended and section 111 (3), there can be no doubt that the statute must prevail. It follows that Article 29 on being amended cannot avail against the statute and create by implication a lien which was expressly forbidden by the statute.

I think therefore that no lien ever attached to the shares.

This consideration appears to me to dispose of the whole case and incidentally of Mr. Laycock's argument that he retains the lien because subsection 4 provides the appropriate penalty, and that the Courts exact a second penalty by forfeiting the lien. That argument is answered by saying that no lien ever attached. I wish however to guard myself from being understood to say that Article 29 is wholly *ultra vires*. I do not think that it necessarily is. I can conceive circumstances in which it would probably be valid to create the lien it proposes to create. I only say that by virtue of the operation of section 111 (3) it cannot avail to bring into existence a lien in this case. The chief difficulty in the way of this view is to be found in the wording of section 111 (4).

> "If any loan is made in contravention of this section, any director or manager of the company or society shall be liable to a fine not exceeding one thousand dollars and shall also be liable for the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities."

It was suggested that this subsection contemplates the validity of a lien made in defiance of subsection (3) and allows the security to be realised. But I do not think the wording of this subsection can be pressed in the case before us so as to give the Bank the benefit of a lien which subsection (3) prevented from coming into existence. It cannot give to a Company which has broken subsection (3) a preferential claim against a debtor over creditors who have committed no breach of the law. There would probably be no objection the company to realising such an asset where there are no adverse claims. But the section really puts the director in the position of guarantors, and as I read it is designed less for the protection of the shareholders than to allow the directors to minimise, if possible, their liability. If they can do so, I think they may, but not preferentially to innocent creditors.

Section 111 (3) was inserted as an amendment after the passing of the main Ordinance. The words of subsection (4) were originally drafted only in relation to subsection (1) and they are strictly apt to it. It is possible that they are not quite so apt to subsection (3), but I do not feel any real difficulty. A Bank might be guilty of lending money to a director without taking any security, and in that case there would be no security for the director to realise under subsection (4). Similarly in the present case there is no security to realise as a security. But I see no hindrance to subsection (4) operating to allow the Bank to prove for their debt as an ordinary creditor. It is probable that it can so prove.

I agree that the appeal should be dismissed with costs.

WHITLEY, J.—I regret that I have come to a different conclusion. The facts are short and not in dispute. The bankrupt was and still is the registered holder of 100 fully paid shares in the Batu Pahat Bank Limited, a Company registered in Singapore. In 1921 he obtained an overdraft. There is no evidence as to what, if any, security he gave but the overdraft was not allowed on the security of his shares, the scrip for which has always remained in his possession.

The original Articles of Association of the Bank contain two articles which are material.

Article 5 reads "No part of the funds of the "Company, shall be employed by the Directors of the Company in the purchase of or lent on the Company's shares."

Article 29 reads:

"Lien on Shares."

"The Company shall have a first and paramount lien upon all the shares (not fully paid up) registered in the name of each member for all calls upon such shares and also for all debts, obligations, engagements and liabilities of such member etc."

As the Bankrupt's shares were fully paid up no lien attached.

In 1927 the Company altered Article 29 by deleting the words "not fully paid up."

The effect of that alteration would *prima facie* be to give the Company a lien upon the Bankrupt's shares, and that is what the Company now claim.

The Official Assignee disputes this lien. He contends that in 1923 the Legislature made it illegal for a Banking Company to create or enjoy such a lien by enacting the amendment contained in section 111 (3) of Ordinance No. 155 (Companies) which reads:

"No banking or insurance Company shall lend any part of its funds upon the security of its shares."

This subsection really amounts to statutory reinforcement to Article 5.

The learned trial Judge upheld the Official Assignee's contention and held that by reason of Section 111 (3) the alteration of Article 29 was *ultra vires*.

It is not disputed that unless section 111 (3) prohibits the creation of such a lien the effect of the alteration in article 29 if made *bona fide* (and there is no suggestion to the contrary) would be to attach a lien to these shares even though the articles provided no lien on them at the time the loan was first made. (See *Allen* v. *Gold Reefs of West Africa* 1900 1 Ch. p. 656).

The learned trial Judge found that "as the Bank is prohibited from making advances on the security of its own shares so it follows that no lien attaches when such advances have been made." With the greatest respect I think he is wrong and that it does not so follow.

It is common ground that the loan in 1921 was not prohibited by Article 5 or at all and that until 1927 the Bank had no lien on the shares. The amendment to Article 29 gave the Bank a lien unless section 111 (3) prohibits such lien. Does section 111 (3) prohibit such a lien? In my opinion it does not.

Section 111 must be read as a whole. The material parts are:—

111 (1) No loan shall be made by any banking company to any director or officer of such company except upon securities in which a trustee may invest under the powers of Ordinance No. 144 (Trustees) and the value of which exceeds the amount lent by thirty per centum.

(2) No such company shall lend any part of its funds upon the security of its shares.

(3) If any loan is made in contravention of this section, any director or manager of the company or society shall be liable to a fine not exceeding one thousand dollars and shall also be liable for the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities.

The section is clearly designed for the protection of the general body of shareholders and depositors by prohibiting certain classes of security for loans. In the case of loans to directors it provides that the Bank must not accept any security other than trustee securities of a certain value and in the case of shareholders it provides that the Bank shall not accept the Bank's shares as securities. Subsection (4) then proceeds to provide for what shall happen in the

event of a director or manager contravening the provisions of subsection (1) or (3) by advancing the Bank's money upon any of these forbidden securities. In such a case it provides firstly that the offending director or manager shall be punished by fine and secondly that the general body of shareholders etc. shall be protected so far as possible by rendering the director or manager liable to make good out of his own pocket any deficit which there may be after realizing the securities which he ought not to have accepted. The subsection clearly contemplates realization of such securities which would seem to involve the Bank having a lien upon them.

In my view the effect of subsections (3) and (4) is shortly this:—A manager or director ought not to advance on the security of the Bank's shares but if he does he incurs a personal liability up to the amount of the inadequacy of those shares as security.

The amendment to Article 29 does not conflict with section 111 but appears to have the same object namely to afford a further safeguard to the interests of the shareholders.

For these reasons I find myself unable to agree with the learned trial Judge that the amendment was *ultra vires.*

I can see no reason why the Bank by its Articles should not create for itself this additional protection. A shareholder may have obtained a loan in the same way as any outsider on the security of title deeds. Can there be any reason why the Bank should not as additional protection create a lien on his shares?

It seems to me that Article 5 cannot have been intended to prevent the Bank from dealing with its shareholders in the ordinary way of business nor can Section 111 (3) reinforcing Article 5 have been intended to prevent a Bank from allowing customers to overdraw if they happen to be shareholders or to deprive the Bank of the additional protection of a lien if a lien is conferred by the Articles.

In my view section 111 and Article 29 as amended can be read together with a perfectly reasonable and natural meaning their joint effect being that the Bank must not lend on the security of its shares but if a person to whom the Bank has lent on other security happens to be or to become a shareholder the Bank for its further protection shall have a lien on his shares.

For these reasons I would allow the appeal.

Appeal dismissed.

Solicitors for the Bank—*Braddell Bros.*

[ORIGINAL BANKRUPTCY JURISDICTION]

RE CHONG FONG SHEN.
EX PARTE PHUMAN SINGH.

[SELANGOR BANKRUPTCY No. 182 of 1932]

Bankruptcy—Costs in bankruptcy—set off.

A judgment creditor caused a bankruptcy notice to be issued and served upon his debtor. The debtor moved to have the notice set aside and his application was allowed with costs. The creditor then applied for a Stay of execution as to these costs, pending ascertainment of the balance due on his decree, with a view to setting-off the amounts payable under the order for costs and the decree against each other.

Held, that the English rule that there can be no set-off of costs in bankruptcy proceedings between a creditor and his debtor was a rule of practice which should not be applied by the Courts of this country.

Veerasamy for the debtor. The set-off ought not to be allowed. Costs in bankruptcy proceedings cannot be set-off against a judgment debt. *In re Drummond* (1909) 2 K.B. 622.

Joaquim for the creditor. According to the practice in England, the set-off would not be allowed; but this is a rule of practice and not of law. The practice originated before the passing of the Judicature Acts when the various Courts were separate and distinct entities. Rule 353 of the English Bankruptcy Rules directs that "when no other provision is made by the Act or these Rules the present law procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force," and this Rule preserved the old practice in England. The constitution and history of our Courts is different from that of the Supreme Court of Judicature in England. Judges in England have expressed doubts as to the justice of the practice. The Court is not bound to and should not apply the practice in this country. *re Adams* 14 C.D. 37; *re Bassett* (1896) 1 Q.B. 219; *re a Debtor* (1907) 2 K.B. 896.

The Hon. Mr. S. Veerasamy (in reply):—

By Section 16 (ii) of the Courts Enactment, 1918, in cases not provided for the practice and procedure of the Court of Appeal in England shall be followed.

MUDIE, J.—This is not a matter of the practice of the Court of Appeal, but of the High Court in Bankruptcy. It is a rule of practice not necessarily applicable in this country, and I do not think that it ought to be applied. In my view the costs ought to be set-off against the decree. There will be a stay of execution for four weeks to enable the balance due on the decree to be ascertained.

Order Accordingly.

Solicitors for the Creditor—*Pooley & Co.*

Solicitor for the Debtor—*S. Veerasamy.*